IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

FIRST WEBER GROUP, INC.,

Plaintiff-Appellant,

v.

JONATHAN HORSFALL,

Defendant-Appellee.

OPINION AND ORDER

11-cv-506-wmc

In this appeal from an adversary proceeding in bankruptcy, plaintiff-appellant First Weber Group, Inc. challenges a finding that an injury it sustained was not excepted from discharge under 11 U.S.C. § 523(a)(6). The appeal raises both a question of law -- whether the bankruptcy court was bound by a state court's purported finding of willfulness in a prior proceeding between the parties here under the doctrine of issue preclusion -- and a question of fact -- whether the court erred in finding that First Weber failed to demonstrate by a preponderance of the evidence that defendant-appellee Jonathan H. Horsfall's conduct was willful. The court affirms the bankruptcy court's decisions in both respects because (1) the elements of nondischargeability under 11 U.S.C. § 523(a)(6) were not "actually litigated and determined in the prior proceeding by a valid judgment in a previous action;" (2) fact issues precluded First Weber's grant of summary judgment in the bankruptcy court; and (3) the bankruptcy court did not clearly err in finding after a full bench trial that Horsfall lacked the required subjective intent or knowledge.

Also before the court is Horsfall's motion for attorneys' fees pursuant to Rule 8020 of the Federal Rules of Bankruptcy Procedure, which argues that First Weber's appeal is frivolous and should be sanctioned. (Appellee's Mot. for Atty.'s Fees (dkt. #13); *see also* Appellee's Opp'n (dkt. #12) 13-17.) While the court agrees with defendant that First Weber at times stretches in its attempts to characterize the record below in a more favorable light, this court does not find the appeal frivolous, particularly the legal question of whether issue preclusion applies. Accordingly, the court will deny defendant's request for sanctions.

BACKGROUND

A. Sale of the Overlook Property

Defendant-Appelleee Jonathan Horsfall was a real estate agent with First Weber from approximately May 4, 2001, to August 29, 2002. Horsfall's relationship with First Weber was governed by an independent contractor agreement.

On February 27, 2002, Robert L. Call executed a state-mandated "WB-1 Exclusive Right to Sell" listing contract with First Weber for his property located at 118 Overlook Terrace, in Marshall, Wisconsin. Call also listed several other properties with First Weber. Horsfall was the "listing agent" for First Weber on the Overlook property.

On August 6, 2002, Hugo, Rosalina and Veronica Acosta ("the Acostas") submitted an Offer to Purchase the Overlook property. Call initially accepted the offer, but ultimately exercised a right to cancel and the sale did not close. On August 28, 2002,

First Weber terminated (or "expired early") Call's listing contract, including the Overlook listing. (The listing contract was set to expire anyway on August 31, 2002.)

Material to the present dispute, the listing contract contains an "Extension of Listing" provision which provides that the listing broker (here, First Weber) is entitled to a commission (here, 6%) should the property be sold to a "protected buyer" during the one-year period after expiration of the listing. A "protected buyer" is defined by the listing contract as any potential buyer who had "either negotiated to acquire an interest in the Property or submitted a written offer to purchase." (R.5, Am. Compl., Ex. D (bankr. dkt. #19) 2:64-66.) Because the Acostas had submitted a written offer during the original term of the listing, they were "protected buyers" under Call's listing contract with First Weber for one year.

Since we already know a lawsuit follows, the next events could almost write themselves. At the end of August 2002, Horsfall left First Weber and began operating his own brokerage, Picket Fence Realty. Shortly after Horsfall left First Weber, he was contacted by the Acostas. In October 2002, Horsfall drafted a new offer from the Acostas for the Overlook property, which Call accepted. Horsfall did not inform First Weber of the sale. Instead, Horsfall purported to be working for both the buyers and Call as a dual agent, although he had no written agreement with either of them. When the transaction closed, Horsfall earned a $6,000 commission, which amounted to approximately 3.75% of the purchase price.

B. State Court Proceeding

Six years later in 2008, First Weber sued Horsfall and Call in Dane County Circuit Court. *First Weber v. Horsfall*, No. 08-CV-4936. First Weber took an assignment from Call and dismissed Call from the action. First Weber then moved for summary judgment against Horsfall, who proceeded *pro se*.

The state court ultimately granted First Weber's motion in an oral opinion and entered judgment against Horsfall in the amount of $10,978.91. (State Court Decision (dkt. #8-3).) After reciting the undisputed facts, the state court described First Weber's claims for (1) breach of contract, (2) tortious interference with a contract, and (3) unjust enrichment:

> The plaintiff claims a breach of . . . the agreement that Horsfall signed for his employment at First Weber. [First Weber] claim[s] interference with the contract that the Acosta's -- the offer that the Acosta's made to purchase the property under the First Weber listing contract, and [First Weber] claim[s] that Horsfall has been unjustly enriched and is personally liable.

(*Id.* at 9:13-20.) The court then discussed First Weber's tortious interference claim, finding:

> It's clear that the plaintiff had a contract or prospective contractual relationship with a third party. The defendant interfered with the relationship. The interference was intentional and a causal intention exists between the interference and the damages, and the defendant was not justified or privileged to interfere.

(*Id.* at 10:12-18.) Also material to the present action, the state court found:

> Instead of paying that commission to First Weber, Mr. Horsfall created a contract in which he did receive a commission. Mr. Horsfall has been unjustly enriched because

> he *converted* a benefit upon himself which was retained under circumstances that was inequitable. He *converted* money rightfully owing to First Weber to himself or to Picket Fence.

(*Id.* at 11:2-9 (emphasis added).) In entering judgment in favor of First Weber, the court once again referenced First Weber's tortious interference claim. (*Id.* at 12:11-17.)

C. Horsfall's Bankruptcy Proceeding

Horsfall filed for Chapter 7 bankruptcy in the Western District of Wisconsin on April 5, 2010. First Weber filed an adversary proceeding, seeking a finding of nondischargeability of its $10,000 judgment pursuant to 11 U.S.C. § 523(a)(6). First Weber again moved for summary judgment on two bases: (1) the factual finding made by the state court with respect to each of the elements of § 523(a)(6) precluded Horsfall from challenging nondischargeability of that state court judgment in bankruptcy; and (2) the undisputed facts established violations of certain statutory/regulatory provisions governing brokerage policies and the Realtor Code of Ethics, which also satisfied the elements under § 523(a)(6). The bankruptcy court denied First Weber's motion, finding that issue preclusion did not apply and that the undisputed facts did not support a finding of nondischargeability as a matter of law.

At trial, the bankruptcy court concluded that First Weber failed to meet its burden of demonstrating a "willful and malicious injury" by Horsfall, and denied First Weber's claim for nondischargeability. (Bankr. Trial Decision (dkt. #8-2) 11 ("I find that the evidence, as a whole, does not compel an inference that the injury sustained by First Weber was 'willful' in nature. Nor does it result from the defendant's malice.").)

PRELIMINARY MATTER

The Wisconsin REALTORS® Association ("WRA") filed a motion for leave to file an amicus brief. (Dkt. #14.) The policy of the Seventh Circuit, which this court will follow here, is to "grant permission to file an amicus brief only when (1) a party is not adequately represented (usually, is not represented at all); (2) the would-be amicus has a direct interest in another case, and the case in which he seeks permission to file an amicus curiae brief, may be materially affected by that interest, typically by operation of stare decisis or res judicata; or (3) the amicus has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do." *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000).

WRA contends that it has an interest in the outcome of this appeal because First Weber's nondischargeability claim "is measured against a background of Wisconsin real estate brokerage license law statutes and regulations, mandatory state real estate forms such as the WB-1 Residential Listing Contract -- Exclusive Right to Sell (mandatory use date 11-1-99), and the REALTOR® Code of Ethics." (Mot. (dkt. #14) ¶ 5.) WRA contends that the bankruptcy court's decision "indicates a possible misunderstanding" of the listing contract. (*Id.* at ¶ 6.) While the court ultimately disagrees that the bankruptcy court misinterpreted Horsfall's and Call's contractual obligations, the court will nonetheless grant WRA's motion for leave to file its amicus brief because it provides information to assist the court's understanding of the role of the various actors in the real estate transaction. Accordingly, the court has considered the brief in forming its decision.

As discussed below, neither the bankruptcy court's decision nor this court's opinion affirming it calls into question in any way the terms or enforceability of the real estate contractual, regulatory and ethical requirements established for Wisconsin real estate transactions; rather, the bankruptcy court's finding that First Weber failed to meet its burden to demonstrate nondischargeability under § 523(a)(6) and this court's decision affirming that determination is limited to the particular facts here and requirements for proof of willfulness under the bankruptcy code.

OPINION

Pursuant to 28 U.S.C. § 158(a), First Weber appeals from the bankruptcy court's judgment on four basis: (1) the court's refusal to find issue preclusion; (2) the court's denial of summary judgment on the undisputed facts before it; (3) the court's post-trial finding that First Weber had failed to demonstrate the elements of nondischargeability under 11 U.S.C. § 523(a)(6); and (4) the court's refusal to allow certain testimony and admit certain evidence at trial, including First Weber's expert testimony.

This court reviews the bankruptcy court's findings of fact deferentially for clear error and its legal conclusions de novo. *See In re Doctors Hosp. of Hyde Park, Inc.*, 474 F.3d 421, 426 (7th Cir. 2007) (citing Fed. R. Bankr. P. 8013; *In re Crosswhite*, 148 F.3d 879, 881 (7th Cir. 1998)). Specific to this appeal, the court reviews the bankruptcy court's refusal to apply issue preclusion de novo as a question of law. *Reeves v. Davis* (*In re Davis*), 638 F.3d 549, 553 (7th Cir. 2011) ("Whether the issue of intent was litigated and resolved in the state court action, as required for application of collateral estoppel, is

[a] question of law."). The court reviews the bankruptcy court's factual findings underpinning its determination of nondischargeability for clear error. *Id.* ("Whether [the debtor] possessed the requisite intent is a question of fact, which is subject to the highly deferential 'clearly erroneous' standard of review.").

I. Exception to Dischargeability

Title 11 U.S.C. § 523(a)(6) provides an exception to discharge "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). In *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), the Supreme Court considered whether "willful" covers acts "done intentionally, that cause injury . . . , or only acts done with the actual intent to cause injury." *Id*. at 61. Relying on the plain language of the statute, the Court held that "[t]he word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Id.* To hold otherwise, the Court reasoned, would mean that "[e]very traffic accident stemming from an initial intentional act" or a "knowing breach of contract" could qualify. *Id.* at 62.

"Because a person will rarely admit to acting in a willful and malicious manner, those requirements must be inferred from the circumstances surrounding the injury." *Weinberger v. AnchorBank, FSB*, No. 10-C-0996, 2011 WL 679343, at *5 (E.D. Wis. Feb. 16, 2011) (citing *Geiger*, 523 U.S. 57). The Supreme Court did not define "intent" in *Geiger.* "Recent decisions, however, have generally found that either a showing of subjective intent to injure the creditor or a showing of subjective knowledge by the

debtor that injury is substantially certain to result from his acts can establish the intent required by *Geiger*." *Nicolas & Assoc., Inc. v. Morgan* (*In re Morgan*), Bankr. No. BR 09 B 42248, Adv. No. 10 A 00253, 2011 WL 3651327, *7 (Bankr. N.D. Ill. Aug. 18, 2011) (citing *Mut. Mgmt. Servs., Inc. v. Fairgrieves* (*In re Fairgrieves*), 426 B.R. 748, 757 (Bankr. N.D. Ill. 2010) (collecting cases)); *see also Petralia v. Jercich* (*In re Jercich*), 238 F.3d 1202, 1208 (9th Cir. 2001) (describing requirement of either a "subjective motive to inflict the injury *or* that the debtor believed that injury was substantially certain to occur as a result of his conduct" as also adopted by the Fifth and Sixth Circuits); *Larsen v. Jendusa-Nicolai*, 442 B.R. 905, 915 (E.D. Wis. 2010) (noting that courts have generally required a subjective intent to injure or subjective knowledge that injury is substantially certain and also noting that the Seventh Circuit has not addressed this issue), *aff'd Jendusa-Nicolai v. Larsen*, 677 F.3d 320, 324 (7th Cir. 2012) ("[A] willful and malicious injury, precluding discharge in bankruptcy of the debt created by the injury, is one that the injurer inflicted knowing he had no legal justification and either desiring to inflict the injury or knowing it was highly likely to result from his act."). In contrast, "malice" under § 523(a)(6) means a "conscious disregard of one's duties or without just cause or excuse; it does not require ill-will or specific intent to do harm." *In re Thirtyacre*, 36 F.3d 697, 700 (7th Cir. 1994).

II. Application of Issue Preclusion

First Weber first argues that the state court found the elements necessary to satisfy 11 U.S.C. § 523(a)(6) and, therefore, the state court's judgment against Horsfall

is not dischargeable. A state court judgment is given the same preclusive effect by a federal court as it would be given by a court of the state in which the judgment was rendered. 28 U.S.C. § 1738. Accordingly, this court looks to Wisconsin state law for guidance on the preclusive effect of the prior state court's finding. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984) ("It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.").

"Collateral estoppel, or issue preclusion, is a doctrine designed to limit the relitigation of issues that have been contested in a previous action between the same or different parties." *Michelle T. by Sumpter v. Crozier*, 173 Wis. 2d 681, 687, 495 N.W.2d 327, 329 (1993). Wisconsin courts apply a two-step analysis to determine whether a prior decision precludes relitigation: "(1) whether issue preclusion can, as a matter of law, be applied, and if so, (2) whether the application of issue preclusion would be fundamentally fair." *In re Estate of Rille ex rel. Rille*, 2007 WI 36, ¶ 36, 300 Wis. 2d 1, 728 N.W.2d 693. For the first step, the court "must determine whether the issue or fact was actually litigated and determined in the prior proceeding by a valid judgment in a previous action and whether the determination was essential to the judgment." *Id.* at ¶ 37.[1] Accordingly, the first and, as it turns out, only question here is whether the state

[1] First Weber claims that the bankruptcy court confused issue preclusion with claim preclusion. (Appellant's Opening Br. (dkt. #7) 30-32.) This is one example of First Weber overreaching in its description of the record to aid an argument. There is *nothing* in the bankruptcy court's opinions which suggests confusion about the difference between claim and issue preclusion. Ironically, the method cited by First Weber as embracing the "proper method" is itself a Judge Martin case. (*Id.* at 31 (citing *Ablan v. Weber* (*In re Weber*), 81 B.R. 482, 484 (Bankr. W.D. Wis. 1986), *aff'd*, 892 F.2d 534 (7th

court actually found "willful and malicious injury by" Horsfall to First Weber or First Weber's property.

A. Purported Conversion Claim

As an initial matter, First Weber focuses on the state court's purported finding that Horsfall "converted" First Weber's commission, no doubt prompted by the bankruptcy court's later observation (without citation) that "[c]onversion . . . is usually acknowledged to be a proper basis for nondischargeability." (Bankr. Trial Decision (dkt. #8-2) 8.) While this court could find no Seventh Circuit case supporting the bankruptcy court's observation, it appears a reasonable one if by conversion, we mean common law theft (that is, the intentional taking of something that you know belongs to, and loss of which will injure, another); but it may not be so obvious if by conversion, we mean the exercise of dominion over property not belonging to you (say by adverse possession). *Compare Del Bino v. Bailey* (*In re Bailey*), 197 F.3d 997, 1000 (9th Cir. 1999) ("The conversion of another's property without knowledge or consent, done intentionally and without justification and excuse, to the other's injury, constitutes a willful and malicious injury within the meaning of § 523(a)(6)."),[2] *with In re Peklar*, 260 F.3d 1035, 1039 (9th

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Cir. 1989).) As in *Weber*, the bankruptcy court properly considered whether the state court's findings of law or fact satisfied the elements (or some of the elements) of § 523(a)(6), thus precluding Horsfall's defense against First Weber's claim for nondischargeability.

[2] In support of its argument that a finding of conversion necessarily satisfied the elements of § 523(a)(6), First Weber cites to the *Bailey* decision cited above and to *Wisconsin Financial Corporation v. Ries* (*In re Ries*), 22 B.R. 343, 346 (Bankr. W.D. Wis. 1982) (Martin, J.). (Appellant's Opening Br. (dkt. #7) 30.) Another Judge Martin decision, *Ries* does not provide the support First Weber seeks, since it emphasized that "[a]lthough conversion clearly constitutes an injury, the injury must be willful and malicious to be

Cir. 2001) ("A judgment for conversion under California substantive law decides only that the defendant has engaged in the 'wrongful exercise of dominion' over the personal property of the plaintiff. It does not necessarily decide that the defendant has caused 'willful and malicious injury' within the meaning of § 523(a)(6). A judgment for conversion under California law therefore does not, without more, establish that a debt arising out of that judgment is non-dischargeable under § 523(a)(6).").

In the end, labeling First Weber's claim as one for "conversion" matters little unless there was a finding that the injury inflicted was willful and malicious. Given that First Weber's focus is on the purported conversion claim, however, the court will first consider whether the state court found Horsfall liable for conversion, but ultimately the more important question is whether the state court made findings that satisfy the elements of § 523(a)(6).

As for the conversion claim, the bankruptcy court properly determined that the state court made no such judgment for several reasons. *First*, while First Weber purports to have moved for summary judgment with respect to "claims on intentional interference (with First Weber's listing), conversion (taking of money rightfully owing exclusively to First Weber), breach of contract (agent agreement) and unjust enrichment" (Appellant's Opening Br. (dkt. #7) 11), the complaint does not state a cause of action for conversion. Instead, First Weber expressly pled claims for (1) breach of the independent contractor agreement, (2) interference with the listing contract, and (3) unjust enrichment. (R. 14,

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excepted from discharge." *Id.* at 346. In other words, a finding of conversion under Wisconsin law does not in and of itself satisfy the elements of § 523(a)(6).

3d Affidavit of Kim Moermond, Ex. P, ¶ 18 (Compl., *First Weber v. Call*, No. 980cv04936 (Wis. Circuit Court, Dane Cnty. filed Oct. 28, 2008)).) More importantly, in reciting the causes of action, the state court recognized only these same three causes of action. (State Court Decision (dkt. #8-3) 9:13-20.)

Second, unlike the state court's treatment of First Weber's claim of tortious interference with a contract, the state court did not describe the elements of a conversion claim, nor address how Horsfall's actions satisfied those elements. First Weber attempts to cast the bankruptcy court's similar assessment as somehow disparaging the state court's decision. This is simply inaccurate; rather, a comparison of the state court's careful treatment of the tortious interference claim with the court's two passing comments that Horsfall "converted" First Weber's commission is a telling indication that the state court did not consider, much less find, a conversion claim under Wisconsin law.[3]

[3] Under Wisconsin law, a conversion claim only applies to tangible property. *Maryland Staffing Servs., Inc. v. Manpower, Inc.*, 936 F. Supp. 1494, 1507 (E.D. Wis. 1996). In rejecting a conversion claim on the merits, the bankruptcy court concluded that the commission is not tangible property. (Bankr. Trial Decision (dkt. #8-2) 9.) Since the question in this appeal is whether the bankruptcy court erred in finding that First Weber failed to demonstrate the elements of § 523(a)(6) by the preponderance of evidence -- not whether the court erred with respect to the merits of any claim for conversion -- the district court will not review this ruling except to note that "a specific, identifiable quantity of currency" may satisfy the tangible property requirement. *Maryland Staffing Servs.*, 936 F. Supp. at 1507 (citing *T.W.S., Inc. v. Nelson*, 150 Wis. 2d 251, 252 n.3, 440 N.W.2d 833 (Ct. App. 1989)). Whether this applies to a claim to a six percent commission of a sum certain, especially when the defendant only received 3.75%, is open to debate, but the state court's failure to even address this element of a conversion claim supports the conclusion that no such claim was made or decided.

Third, issue preclusion only applies under Wisconsin law if the determination made in the first court proceeding "was essential to the judgment." *In re Estate of Rille ex rel. Rille*, 2007 WI 36, at ¶ 37. In entering judgment against Horsfall, the state court specifically referenced his tortious interference, again making no mention of a conversion claim. (State Court Decision Tr. (dkt. #8-3) 12:11-17.)

B. State Court's Actual Findings

This leaves only the basic question: whether the state court's findings satisfy the elements of § 523(a)(6), precluding Horsfall's defense to First Weber's claim on non-dischargeability. Again, the plaintiff has the worse of the argument. *First*, the state court found Horsfall had tortiously interfered with First Weber's contract with Call. Under Wisconsin law, the elements of tortious interference with a contract are: "(1) the plaintiff had a contract or prospective contractual relationship with a third party; (2) the defendant interfered with the relationship; (3) the interference was intentional; (4) a causal connection exists between the interference and the damages; and (5) the defendant was not justified or privileged to interfere." *Dorr v. Sacred Heart Hosp.*, 228 Wis. 2d 425, 456, 597 N.W.2d 462, 478 (Ct. App. 1999) (citing *Cudd v. Crownhart,* 122 Wis. 2d 656, 659-60, 364 N.W.2d 158, 160 (Ct. App. 1985)). Moreover, "[t]o have the requisite intent, the defendant must act with a purpose to interfere with the contract." *Dorr*, 228 Wis. 2d at 457, 597 N.W.2d at 478.

In Wisconsin, tortious interference requires an intent to act, but not an intent to cause injury, a meaningful distinction under *Geiger*. In *Hoff v. Bellerud* (*In re Bellerud*),

Bankr. No. 08-24463-svk, Adv. No. 09-2181, 2009 WL 1139470 (Bankr. E.D. Wis. Apr. 24, 2009), for example, the court refused to apply issue preclusion despite a jury finding that the debtor had intentionally and without justification interfered with a contract. The *Hoff* court found that "less than clear" evidence was presented to the jury to prove that the debtor's intentional interference was not justified, but "inadequate evidence presented" to show that he acted willfully and maliciously against the creditor. *Id*. at *5. So, too, the state court's conclusion that First Weber had demonstrated Horsfall's tortious interference with First Weber's contract does not necessarily satisfy the elements of § 523(a)(6).

Second, in finding interference with the contract, the state court here opined: "The interference was intentional and a *causal intention* exists between the interference and the damages[.]" (State Court Decision (dkt. #8-3) 10:15-17 (emphasis added).) In its decision denying First Weber's motion for summary judgment, the bankruptcy court mistakenly quoted the passage as a "causal connection." (Bankr. Summ. J. Op. (dkt. #8-1) 5.) The bankruptcy court's error is understandable; it is likely that the state court intended to say "causal connection," since this phrase has meaning within the context of a tortious inference with a contract claim. *See Dorr*, 228 Wis. 2d at 456, 597 N.W.2d at 478 (describing the fourth element of such a claim as "a causal connection exists between the interference and the damages"). Even assuming the state court chose to use the clumsy phrase "causal intention," it does not necessarily mean that the court found Horsfall intended to *injure* First Weber, as opposed to a finding that Horsfall intended to

cause a breach of the contract for his own benefit, with only the possibility that First Weber would be damaged.

Because the elements of nondischargeability under 11 U.S.C. § 523(a)(6) do not appear to have been "actually litigated and determined in the prior proceeding by a valid judgment in a previous action," the court will affirm the bankruptcy court's refusal to apply the doctrine of issue preclusion to First Weber's claim for nondischargeability.

As such, the court need not consider the second step: whether the application of the doctrine would be fundamentally fair. *See In re Estate of Rille ex rel. Rille*, 2007 WI 36, ¶ 37 ("Issue preclusion can be applied only if this first step is satisfied."). The court would note that if this were a closer question, the principle that "[e]xceptions to discharge are to be construed strictly against the creditor and liberally in favor of the debtor" would further caution against applying issue preclusion here. *In re Morgan*, 2011 WL 3651327, at *3 (citing *In re Morris,* 223 F.3d 548, 552 (7th Cir. 2000)); *Kolodziej v. Reines (In re Reines)*, 142 F.3d 970, 972-73 (7th Cir. 1998)); *see also Michelle T.*, 173 Wis. 2d at 689, 495 N.W.2d at 330-31 (listing five factors for the court to consider in deciding whether application of issue preclusion would be fair, including "matters of public policy").

III.Finding of Dischargeability

First Weber also challenges the bankruptcy court's independent refusal to find non-dischargeability pursuant to 11 U.S.C. § 523(a)(6) as a matter of law at summary judgment and as a matter of fact based on the evidence presented at trial. "Whether an

actor behaved willfully and maliciously is ultimately a question of fact reserved for the trier of fact." *Matter of Thirtyacre*, 36 F.3d 697, 700 (7th Cir. 1994). As such, the court reviews the bankruptcy court's factual findings under a deferential standard: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses." Fed. R. of Bankr. P. 8013; *see also In re Doctors Hosp. of Hyde Park, Inc.*, 474 F.3d at 426.

First Weber describes in detail the evidence supporting its claim that Horsfall acted contrary to contractual obligations, to state law and to the Realtor Code of Ethics. (Appellant's Opening Br. (dkt. #7) 33-53.) As explained above, however, a finding of breach of a contract, and even violations of state law and the ethical rules, are generally insufficient under *Geiger* to prove Horsfall intended to injure First Weber.

Since the nature of Horsfall's intent and subjective knowledge are fact issues, First Weber has a decidedly uphill burden in establishing that the bankruptcy court erred in denying summary judgment. Fed. R. Civ. P. 56(c) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact, and the movant is entitled to judgment as a matter of law.") (applied to adversary proceedings pursuant to Fed. R. Bankr. P. 7056(c)).[4]

[4] First Weber takes issue with Horsfall's affidavit submitted in opposition to First Weber's motion for summary judgment, characterizing it as "self-serving and conclusory." (Appellant's Opening Br. (dkt. #7) 32 (citing R.11, Affidavit of Jonathan H. Horsfall (bankr. dkt. #29)).) The affidavit might well be characterized as self-serving in so far as it describes Horsfall's version of the facts surrounding Call's listing contract and sale of the Overlook property, but it is *not* conclusory. On the contrary, the affidavit appears to provide a specific account of the events surrounding First Weber's claim from

Moreover, in determining that Horsfall did not act with the required willfulness, the bankruptcy court expressly (1) credited his testimony and (2) found Call's testimony favorable to First Weber's position to be incredible: "The defendant credibly testified that he has never had any ill-will or animosity towards First Weber. At all times, the defendant believed his duties and obligations to First Weber under both the agent agreement and under Call's listing contracts were terminated when the contracts themselves were cancelled or expired." (Bankr. Trial Decision (dkt. #8-2) 5.)[5] As the Seventh Circuit explained in a case affirming a bankruptcy court's denial of a claim for nondischargeability under § 523(a)(4), a bankruptcy court's witness credibility determinations "can virtually never amount to clear error." *In re Davis*, 638 F.3d at 554 (quoting *Carnes Co. v. Stone Creek Mech., Inc.,* 412 F.3d 845, 848 (7th Cir. 2005).

Accordingly, the court will affirm the bankruptcy court's (1) denial of First Weber's motion for summary judgment on its claim for nondischargeability, and (2) ultimate finding that First Weber failed to demonstrate by a preponderance of the evidence that Horsfall acted with the required willfulness under § 523(a)(6).

Horsfall's perspective and personal knowledge. As such, it was properly considered by the bankruptcy court. *See Berry v. Chi. Transit Auth.*, 618 F.3d 688, 691 (7th Cir. 2010) ("It is worth pointing out here that we long ago buried -- or at least tried to bury -- the misconception that uncorroborated testimony from the non-movant cannot prevent summary judgment because it is 'self-serving.' If based on personal knowledge or firsthand experience, such testimony can be evidence of disputed material facts.").

[5] The bankruptcy court further found that Call's "claimed ignorance of the one-year exclusion period and the nature of protected buyers is incredible in light of Call's business and real estate experience." (Bankr. Trial Decision (dkt. #8-2) 5.)

IV. Evidentiary Rulings

Finally, First Weber challenges the bankruptcy court's exclusion of certain evidence and testimony, including that of First Weber's expert. This evidence all concerned what the average Wisconsin real estate agent should know. If the court were considering the willful test as an objective one, this evidence might well be relevant. But given the subjective requirement of intent or knowledge, the court cannot find that the bankruptcy court abused its discretion in excluding this evidence. Moreover, any arguable error would have been harmless given the bankruptcy court's reasonable reliance on Horsfall's actual trial testimony, which that court deemed credible, to find that he lacked the necessary intent or knowledge to find that the injury to First Weber was willful and malicious under § 523(a)(6).

ORDER

IT IS ORDERED that:

1) Wisconsin Realtors Association's motion for leave to file an amicus brief (dkt. #14) is GRANTED;

2) Appellee Horsfall's motion for attorneys' fees pursuant to Fed. R. Bankr. P. 8020 (dkt. #13) is DENIED; and

3) the bankruptcy court's denial of appellant First Weber's claim for nondischargeability is AFFIRMED.

Entered this 17th day of December, 2012.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge